Supreme Court, U.S.
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No. 02-951

IN THE

Supreme Court of the United States

THYSSEN INC.,

Petitioner,

v.

M/V MARKOS N, etc., et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether, given that Petitioner had agreed to arbitrate its disputes, the Federal Arbitration Act and federal policy favoring arbitration limited Petitioner's *in rem* rights to obtaining security for its claim and therefore, once the agreed tribunal held Petitioner's claims were time-barred, Petitioner's *in rem* security was properly dismissed.

II. Whether referring Petitioner's claims to arbitration in London deprived Petitioner of its *in rem* rights or otherwise diminished the carrier's obligations under COGSA where Petitioner had accepted security in place of its *in rem* claim and, in any event, English law permits claimants to arrest vessels *in rem* for cargo damage claims.

III. Whether the lower courts correctly concluded that Respondents had not waived their right to arbitration, even though arbitration was not included as an affirmative defense in Respondents' answer, where the litigation essentially was dormant between the filing of the answer and Respondent's motion to stay pending arbitration, and where Petitioner's only claim of prejudice — the passing of the time bar — was due solely to Petitioner's failure to act reasonably to protect itself in its contractually agreed forum.

STATEMENT PURSUANT TO RULE 29.6

Respondents, Calypso Shipping Corp., S.A. and A.M. Nomikos & Son (U.K.) Ltd., have no parents, and no publicly held companies own 10% or more of their stock.

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COUNTER-STATEMENT OF THE CASE

i. *Facts*

On October 26, 1996, Petitioner purchased a cargo of steel from Metalsrussia, a Hong Kong trading company. On January 18, 1997, Metalsrussia chartered the MARKOS N from Western Bulk Carriers to perform its transport obligations under the sales contract. Western Bulk Carriers had previously time chartered the MARKOS N from her owners, Respondent, Calypso Shipping Corp., S. A., pursuant to a charter party dated January 9, 1996.

The MARKOS N charter between Western Bulk Carriers and Metalsrussia was fixed on the "Gencon" charter form and provided that the "congenbill" form bill of lading was to be used for bills of lading issued under the charter. The congenbill clause paramount provides:

> (a) The Hague Rules contained in the International Convention for the Unification of certain rules relating to Bills of Lading, dated Brussels the 25th August 1924 as enacted in the country of shipment, shall apply to this Bill of Lading. When no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination shall apply. . . .

The MARKOS N charter also contained an arbitration clause, which provided: "[t]his Charter Party shall be governed and construed in accordance with English Law and any dispute arising under this Charter Party or Bills of Lading issued hereunder to be referred to arbitration in London."

Metalsrussia prepared the bills of lading for the shipment in Hong Kong on "congenbill" forms and forwarded them to Western Bulk Carriers' Hong Kong agents for issuance. The bills incorporated the MARKOS N charter and arbitration clause by reference. The cargo was loaded on the MARKOS N in Ventspils, Latvia, bills of lading dated January 23 and 24, 1997 were issued, and the MARKOS N sailed on her voyage. When the vessel arrived at Houston, her first port of call in the United States, the receivers claimed that the cargo was damaged by rust.

ii. ***Proceedings Below***

Petitioner commenced this action by filing a complaint in the United States District Court for the Southern District of Texas on March 5, 1997. The complaint named CALYPSO SHIPPING CORP., S.A., A.M. NOMIKOS & SON (U.K.) LTD., and the M/V MARKOS N *in rem*, as defendants. The same day, Petitioner obtained a warrant for the arrest of the MARKOS N.

In consideration of Petitioner releasing the MARKOS N from arrest and refraining from arresting her in the future, Respondents tendered and Petitioner accepted security in the form of a standard "Club Letter of Undertaking" issued by the vessel's protection and indemnity insurer, the United Kingdom Mutual Steamship Assurance Association. The Club Letter reserved "all defenses available to the ship and its owner, none of which is to be considered waived." The Club Letter further provided that "upon your demand" Calypso would file an appearance and claim of owner in the litigation.

The action was subsequently transferred to the District Court for the Southern District of New York at Petitioner's request and by agreement of the parties. On March 11, 1998, the M/V MARKOS N's owner, Calypso Shipping Corp., filed a claim of owner and an answer on behalf of the vessel.[1] The Answer did not raise arbitration as a defense.

On November 4, 1998, Petitioner moved for partial summary judgment striking the vessel owner's COGSA package limitation defense. On January 19, 1999, Respondent filed its opposition to Petitioner's motion and cross moved for an order staying the action pending an arbitration pursuant to the arbitration agreement incorporated by reference in the bill of lading or, in the alternative, for an order confirming the package limitation.

On August 12, 1999, the District Court issued an Order and Opinion staying the litigation pending arbitration. The court held that *all* Petitioner's claims, whether designated as *in rem* or *in personam* or tort claims, were subject to arbitration.

Petitioner thereafter served on Respondents and filed with the District Court a Notice of Appointment of Arbitrator and Demand for Arbitration in London. The notice demanded arbitration against all Respondents, including the vessel *in rem*. Respondent duly appointed an arbitrator upon receiving the demand.

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1. "Respondent," unless otherwise qualified, refers to the M/V MARKOS N. "Respondents" refer to the vessel and her owner Calypso Shipping Corp., S.A.

Petitioner subsequently requested Respondents to agree to submit the time-bar issue to the London Commercial Court for decision instead of to the arbitrators. The issues for decision by the Commercial Court were: (1) whether the filing of suit in the United States suspended the Hague-Visby one-year statute of limitations so that the commencement of arbitration in London was timely; and (2) if not, whether the court should exercise the discretion afforded it under the English Arbitration Act to extend the time to commence the arbitration. Nothing was said by Petitioner in its proposal or in its submissions to the London court about excluding the *in rem* claim from the proposed ruling. Respondents agreed with Petitioner's proposal.

The Commercial Court issued its decision on June 23, 2000, holding that Petitioner's claims were in all respects time-barred. The court first ruled that Petitioner's commencement of the United States action in breach of its arbitration obligations did not suspend the limitations period for commencing the arbitration in London. In expressly rejecting Petitioner's argument that the commencement of the *in rem* action suspended the time bar, the court reasoned:

> 15. This is not just a surprising proposition. It gives rise to absurd results. The mere institution of proceedings in any court with jurisdiction in principle, regardless of whether service of those proceedings could in fact be affected and even regardless of any contractual commitment to use another forum, would prevent the shipowner from being discharged from liability by reason of the passage of time and allow the claimant to institute proceedings in an appropriate contractual forum at any time thereafter, immune from any time bar

> threat (at least so far as English jurisdiction is concerned given the provisions of s.39 of the Limitation Act 1980).

The Commercial Court further refused to exercise its discretion to extend the time-bar. The court held that Petitioner had not acted reasonably in attempting to determine its arbitration obligations, and thereby in protecting its rights. In reaching this conclusion, the court commented that it viewed Mr. Golding's witness statement, submitted in support of Petitioner's position, with "considerable skepticism." The court, therefore, concluded that Petitioner's failure to timely commence arbitration could not be attributed to any conduct of Respondents, but rather was Petitioner's own fault.

On June 26, 2000, the Commercial Court issued an order enforcing its judgment and dismissing Petitioner's claims. The Commercial Court granted Petitioner leave to appeal, but Petitioner did not do so.

On September 11, 2000, based on the English court's decision, Respondent moved for dismissal with prejudice of Petitioner's claims in the Southern District of New York. The District Court treated Respondent's motion as a motion to confirm the arbitration award and, on August 7, 2001, issued an Opinion and Order dismissing Petitioner's action. Judgment was entered thereon on August 13, 2001.

On August 29, 2001, Petitioner appealed the District Court's decision to the Court of Appeals for the Second Circuit. The Court of Appeals affirmed the District Court's decision in all respects, holding: (1) that the arbitration clause applied to Petitioner and that Respondents had not waived their right to arbitration because Petitioner had not shown it

had suffered any prejudice; (2) that Section 8 of the Federal Arbitration Act prohibited Petitioner from litigating the merits of its *in rem* claim outside of arbitration and that the London court's decision on Petitioner's *in personam* claims was dispositive of Petitioner's *in rem* claim as well; and (3) that the referral of Petitioner's *in rem* claim to London arbitration did not violate Section 3 (8) of the United States Carriage of Goods by Sea Act ("COGSA").

REASONS FOR DENYING THE PETITION

The decision of the Court of Appeals on all issues is correct and does not conflict with any decision of this Court or any other court of appeals, nor does the Court of Appeals decision decide an important question of federal law that has not been, but should be, settled by this Court. The question raised by Petitioner concerning the relationship between the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"), and a cargo claimant's *in rem* rights does not present a conflict of authorities. Petitioner's claimed "conflict" rather is an argument against the balance struck by Congress in section 8 of the FAA, which preserves a maritime claimant's right to *in rem* remedies, but limits the exercise of that right to obtaining security for its claims in arbitration. The Court of Appeals in this case therefore properly rejected Petitioner's argument that a claimant is entitled to litigate its *in rem* claims on the merits notwithstanding its agreement to arbitrate, and no court of appeals has held to the contrary.

Although the question of whether enforcing a bill of lading clause requiring a claimant to arbitrate in a forum that does not recognize *in rem* rights may implicate this Court's holding in *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (hereinafter "*Sky Reefer*"),

that is not the issue presented in this case. Petitioner had already exercised its *in rem* rights by arresting the MARKOS N and obtaining security for its claim in arbitration *before* the district court ordered arbitration. In any event, it is uncontroverted that under English law a cargo claimant does have *in rem* rights to arrest a vessel. Therefore, as the Second Circuit correctly recognized, this case does not involve a denial of *in rem* rights in any forum.

Petitioner's final issue concerning waiver of Respondent's right to arbitrate is fact specific, concerns the District Court's exercise of its discretion, and does not implicate any considerations or policies beyond the parameters of this case. It therefore is an inappropriate issue for the grant of certiorari. Petitioner's attempt to guild the issue by characterizing it as a conflict between *in rem* rights and the policy favoring arbitration does not change its stature or appropriateness for further review.

POINT I

THE DISMISSAL OF PETITIONER'S IN REM CLAIM WAS MANDATED BY THE FEDERAL ARBITRATION ACT AND DID NOT DEPRIVE PETITIONER OF ITS IN REM RIGHTS

Petitioner argues, based on the "fiction" that the vessel itself is the offending entity and can be sued *in rem* in its own name, that it should be entitled to litigate its claim against the M/V MARKOS N in the district court regardless of its contractual obligation to arbitrate and notwithstanding the decision of the English court holding its claims against defendant barred. Petitioner contends that to the extent section 8 of the FAA requires otherwise, the FAA conflicts

with well-established *in rem* rights and that this "conflict" merits a grant of certiorari. While maritime law does still recognize a distinction between *in rem* and *in personam* actions and for some purposes still regards the vessel as a judicial person, that "fiction" does not create a conflict with or override the FAA, or otherwise justify giving Petitioner the second bite at the apple it wants in this case.

A. *The FAA Does Not Conflict With Or Otherwise Deprive A Maritime Claimant Of In Rem Rights*

Petitioner's argument does not present a conflict between *in rem* rights and the FAA. Petitioner's argument rather is a complaint against the balance struck by Congress in enacting section 8 of the FAA, which reconciles a claimant's *in rem* rights with the strong public policy favoring the resolution of disputes through arbitration. Section 2 of the FAA specifically provides that the Act applies to arbitration agreements in "maritime transactions," which section 1 defines as:

> Charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction.

The maritime transactions listed all give rise to *in rem* claims against vessels. Congress therefore contemplated such *in rem* claims when it enacted the FAA and, within the framework of mandatory arbitration, expressly preserved a maritime litigant's right to secure its claims by the traditional

admiralty *in rem* remedies. Section 8 of the FAA provides in pertinent part:

> If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

The unambiguous language of this statutory provision and the decisions construing it leave no doubt that the section was not intended to exempt *in rem* claims from the FAA's general requirement of arbitration, but rather was intended to preserve a maritime claimant's right to obtain security for its claims in arbitration. *The Anaconda v. American Sugar Refining Co.*, 322 U.S. 42 (1944) (an aggrieved party is entitled to invoke the traditional admiralty procedure with its concomitant security, but is still required to arbitrate his grievance rather than litigate the merits in court); *Greenwich Marine, Inc. v. S.S. Alexandra*, 225 F. Supp. 671 (S.D.N.Y. 1964), *aff'd.* 339 F.2d 901 (2d Cir.1965) (purpose of this section of FAA providing for seizure of the vessel is to permit the party having admiralty cause of action to commence suit in admiralty so that vessel or other property may be seized and held as security until arbitration is concluded); *Diana Compania Maritima, S.A. v. Subfreights of the S.S. Admiralty Flyer*, 280 F. Supp. 607 (S.D.N.Y. 1968) (purpose of this

section of FAA is to give an aggrieved party the benefit of security provided by jurisdiction *in rem* while preserving the right to arbitrate).

Once a claimant obtains its *in personam* arbitration award, Section 8 of the FAA entitles that claimant to enforce its award in Federal court against the vessel *in rem*. *Diana Compania Maritima*, 280 F. Supp. at 616 (even though the order to compel arbitration was only against the owner, an order pursuant to 9 U.S.C. § 8 confirming the arbitration award is effective *in rem* against the vessel's subfreights); *Rainbow Line, Inc. v. M/V TEQUILA*, 341 F. Supp. 459, 462 (S.D.N.Y. 1972), *aff'd.* 480 F.2d 1024 (2d Cir. 1973) (the court's judgment can be *in rem* against the vessel even though the arbitration award was *in personam*).

All of the reported decisions that have considered the issue have rejected the very argument advanced by Petitioner here — that a plaintiff may pursue its *in rem* claim independently of an *in personam* claim subject to arbitration. *Cargill B.V. v. S/S Ocean Traveler*, 726 F. Supp. 56 (S.D.N.Y. 1989); *Diana Compania Maritima*, 280 F. Supp. 607 (S.D.N.Y. 1968); *Newport Petroleum, Inc. v. Tug Justine Foss*, 1998 A.M.C. 231 (W.D. Wash. 1997) (not otherwise reported). And in other contexts, this Court has cautioned that the maritime personification of the ship should not be allowed to yield tortured results, or "cut down" the scope of congressional enactments. *Continental Grain Company v. Barge FBL-585*, 364 U.S. 19, 27 (1960) (rejecting plaintiff's contention that for purposes of the civil rules on transfer, 28 U.S.C. 1404(a), plaintiff's *in rem* action against a barge in Louisiana was a separate action from an *in personam* action arising out of the same incident brought by the barge owner against the plaintiff in Tennessee).

These decisions, as well as that of the Court of Appeals in this case, unquestionably are correct. To hold otherwise would be to completely undermine the FAA in maritime matters. A maritime claimant wishing to avoid its arbitration obligation could do so easily by commencing an *in rem* action. Under Petitioner's theory, such a claimant would be entitled to proceed with that litigation, notwithstanding its arbitration obligations, and obtain a judgment on the merits — whether or not it proceeds with arbitration and regardless of the arbitrator's decision. This could not have been Congress' intent in enacting the FAA, nor does it foster the strong public policy of encouraging resolution of disputes by arbitration.

The Court of Appeals therefore properly affirmed the district court's dismissal of Petitioner's action, rejecting Petitioner's attempt to twist what was intended only as a means to obtain security into a weapon to defeat the FAA's central purpose of enforcing agreements to arbitrate and awards rendered pursuant thereto. Since Petitioner's chosen tribunal, the London Commercial Court, concluded that Petitioner's substantive claims were time-barred for failing to timely commence arbitration, Petitioner no longer had a claim to enforce against the *in rem* security.

B. *The In Personam Decision Prohibits Petitioner From Proceeding With It's Pending In Rem Claim*

Petitioner's argument concerning *res judicata* and collateral estoppel misses the point. The FAA prohibits Petitioner from proceeding with its *in rem* claims, not principles of *res judicata* or collateral estoppel. Since Petitioner's *in rem* claim has been limited by Congress to one for security only, Petitioner's broad *res judicata* and collateral estoppel arguments are of

no consequence. The Court of Appeals recognized this in observing "we do not decide today whether admiralty claims *in rem* ever survive the dismissal of *in personam* claims." (Petitioner's Brief, Appendix A at 10a, n.2).

But even if Petitioner's right to litigate its *in rem* claim were not prohibited by the FAA, it would be prohibited by principles of *res judicata*. The underlying legal principle advanced by Petitioner here — that the adverse decision on its *in personam* claim is not binding on its *in rem* action — was rejected long ago. *Continental Grain Company v. Barge FBL-585*, 364 U.S. 19, 25 (1960), ("it may be further observed that courts have not felt themselves bound by this fiction when confronted with the argument that because *in rem* and *in personam* actions involve different parties, therefore *res judicata* does not apply from an *in personam* action against an owner to an *in rem* action against his ship").

POINT II

THE REFERRAL OF PLAINTIFF'S CLAIMS TO ARBITRATION IN LONDON DID NOT CONTRAVENE COGSA SECTION 1303(8)

Petitioner argues that requiring it to arbitrate in London "violates COGSA's prohibition against clauses relieving the ship of liability" because *in rem* rights are not available to it in that forum. Petitioner further contends that the Court of Appeals decision in this case conflicts with this Court's decision in *Sky Reefer* and that "a conflict among the courts has arisen over whether an *in rem* claim can properly be dismissed in favor of a foreign forum where the law of the foreign forum does not recognize *in rem* actions." Petitioners are wrong on all counts.

A. *Petitioner's In Rem Rights Were Fully Protected In This Case*

However interesting the issue raised by Petitioner may be in the abstract, it is not the issue presented in this case because Petitioner was not denied any *in rem* rights. Long before the litigation was stayed pending arbitration, Petitioner fully exercised its *in rem* rights when it arrested the vessel in early March 1997, and accepted a Club Letter of Undertaking in the amount of $600,000 as full security for its claims. In consideration of this security Petitioner agreed to refrain from again arresting or attaching the MARKOS N for the same claim. This security effectively replaced the vessel as the *res*, thereby extinguishing Petitioner's maritime lien. *Mackensworth v. S.S. American Merchant*, 28 F. 3d 246, 252 (2d Cir. 1994). *See also*, *Alyeska Pipeline Services Co. v. The Vessel Bay Ridge*, 703 F. 2d 381, 384 (9th Cir. 1983), *cert. dismissed*, 467 U.S. 1247 (1984).[2] Petitioner's *in rem* rights thus remained inviolate.

Moreover, Petitioner is mistaken insofar as it suggests that *in rem* rights are not available in England. It is uncontroverted in the record that an *in rem* action could have been brought in England and security obtained for Petitioner's claims in arbitration to the same extent as permitted under United States law. Petitioner's argument that English arbitrators do not have *in rem* powers is the classic "red

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2. If the London arbitrators had issued an award in Petitioner's favor, Petitioner would have been entitled under the FAA, and under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. §§ 201 *et. seq.*, to enforce that award against the security — just as if the arbitration had been held in New York or the court had continued with the litigation to judgment.

herring." Of course English arbitrators do not have *in rem* powers. Neither do arbitrators in the United States. Only a federal district court sitting "in admiralty" may exercise *in rem* jurisdiction over maritime property. *Madruga v. Superior Court*, 346 U.S. 556 (1954). This does not mean that a party who has agreed to arbitrate in the United States is not entitled to exercise its *in rem* rights. Section 8 of the Federal Arbitration Act expressly preserves a litigant's *in rem* rights to obtain security for its claim, but requires that claim to be arbitrated and not litigated. The same is true in England under similar legislation and practice. Thus, in both England and the United States, while the arbitrators have no *in rem* jurisdiction, the arbitration awards that they render are enforceable in court against the *in rem* security obtained.[3] Accordingly, Petitioner's *in rem* rights were not restricted or diminished in any way by having to arbitrate its claim in London.

B. *The Court of Appeals' Decision Does Not Contravene This Court's Decision in Sky Reefer, Nor Is There A Conflict in the Circuit Courts On This Issue*

Petitioner argues that the Court of Appeals' decision conflicts with this Court's decision in *Sky Reefer* because the lack of an *in rem* remedy in English arbitration impermissibly reduces the carrier's obligations to the cargo owners below what COGSA guarantees. As demonstrated

3. *In rem* security frequently is obtained in the United States for arbitrations in London and vice versa. English arbitration awards are enforceable against security obtained here pursuant the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. 201 *et seq.*, to which the United States and the United Kingdom are both signatories.

under Point II A above, however, Petitioner was not deprived of any *in rem* rights. It fully exercised its *in rem* rights in arresting the MARKOS N and obtaining security for its claim. Moreover, Petitioner's *in rem* rights in England in connection with the arbitration were no different than if the arbitration would have proceeded in the United States. Since Petitioner's *in rem* rights were not diminished by requiring it to arbitrate in London, the Court of Appeals' decision did not contravene COGSA or conflict with this Court's decision in *Sky Reefer*.

There is also no conflict in the courts of appeals. The Second Circuit is the only court of appeals to rule on the issue presented here. Several district courts also have considered it, with most holding that once security is given, referring the matter to foreign arbitration or enforcing a foreign forum selection clause does not violate a plaintiff's *in rem* rights or diminish the ship's obligations under COGSA. *See, e.g., Salim Oleochemicals, Inc. v. M/V SHROPSHIRE*, 169 F. Supp. 2d 194 (S.D.N.Y. 2001), *aff'd.*, CV 01-7624, 2002 U.S. App. LEXIS 14124 (2d Cir. July 9, 2002), *cert. denied* 123 S. Ct. 696 (2002); *Macsteel Int'l U.S.A. Corp. v. M/V Spar Two*, 00 Civ. 9663 (JSR), 2002 U. S. Dist. 5127, at *4 (S.D.N.Y. March 28, 2002); *Reed & Barton Corp. v. M/V TOKIO EXPRESS*, 98 Civ. 1079 (LAP), 1999 U. S. Dist. LEXIS 1807, 1999 A.M.C. 1088 (S.D.N.Y. February 22, 1999).

The district court's decision in *International Marine Underwriters v. M/V KASIF KALKAVAN*, 989 F. Supp. 498 (S.D.N.Y. 1998), on which Petitioner places principal reliance, is not to the contrary. The trial court granted defendant's motion to dismiss, but did so without prejudice to plaintiff's right to bring a subsequent *in rem* action against the ship in the United States to obtain security.

The implication of the court's decision is clear: so long as a claimant has a right to obtain (or has obtained) security for its claim, neither the claimant's *in rem* rights nor COGSA are violated by requiring a claimant to litigate in the contractually agreed forum, even if that forum does not recognize *in rem* proceedings.[4] Petitioner's reliance on *Allianz Ins. Co. v. Cho Yang Shipping Co.*, 131 F. Supp. 2d 787 (E.D. Va. 2000), similarly is misplaced. In *Allianz*, as in *Kasif Kalkavan*, the plaintiff had not arrested the vessel nor had it obtained security for its *in rem* claim.

The only reported decision that squarely supports Petitioner's position is *Tokio Marine & Fire Ins. Co. v. M/V TURQUOISE*, C/A NO. 2:00-0379-18, 2001 U. S. Dist. LEXIS 14689 (D.S.C. April 23, 2001), which involved a motion to dismiss an *in rem* action and enforce a Korean forum selection clause. Although the plaintiff accepted a letter of undertaking in consideration of not arresting the vessel, the court nonetheless refused to dismiss the action. It is respectfully suggested that this case was wrongfully decided and that the cases decided in the Southern District of New York referred to above are correct for the reasons given.

Nor is there a conflict in the courts of appeals on the broad issue articulated by Petitioner — whether the lack of *in rem* rights in the agreed foreign forum violates COGSA — even though as demonstrated above this is *not* the issue presented in this case. The only court of appeals decision that has addressed this issue is the Ninth Circuit in *Fireman's Fund Insurance Co. v. Cho-Yang Shipping Company, Ltd.*, 131 F. 3d 1336 (9th Cir. 1998), *cert. denied*, 525 U.S. 921

4. Judge Rakoff's "implicit" holding in the *Kasif Kalkavan*, became explicit when he decided the *Macsteel* case discussed above.

(1988). No security was given in that case. The court nonetheless held that the lack of an *in rem* right in the designated forum of Korea was not a reduction of the carrier's obligations under COGSA. Although some district courts have disagreed with *Fireman's Fund*[5], no circuit court has held to the contrary. And the Second Circuit in the present case, citing *Fireman's Fund*, acknowledged that a contrary ruling "would contradict most case law on the matter." Thus, there is no conflict among the courts of appeals which would justify the grant of this petition for certiorari even if the issues articulated by Petitioner were the actual issues presented in this case.

POINT III

RESPONDENT NEVER WAIVED ITS RIGHT TO ARBITRATION AND PETITIONER HAS FAILED TO DEMONSTRATE PREJUDICE

No matter how Petitioner attempts to characterize it, Petitioner's waiver argument is no more than a request to review the Court of Appeals' ruling that the district court did not abuse its discretion in concluding that Petitioner had failed to prove the prejudice necessary to justify finding a waiver of arbitration rights. No policies or important considerations are presented, and the proposed review would involve scrutinizing the specific facts for alleged abuses of discretion. Such a further review is not an appropriate basis upon which to grant certiorari.

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5. *International Marine Underwriters v. M/V KASIF KALKAVAN*, 989 F. Supp. 498 (S.D.N.Y. 1998); *Allianz Insurance Co. v. Cho Yang Shipping Co.*, 131 F. Supp. 2d 787 (E.D. Va. 2000); *Tokio Marine & Fire Ins. Co. v. M/V Turquoise*, C/A No. 2:00-0379-18, 2001 U.S. Dist. LEXIS 14689 (D.S.C. April 24, 2001).

In any event, the Court of Appeals and the District Court decisions are correct. Federal public policy strongly favors arbitration as an alternative means of dispute resolution. *PPG Indus. v. Webster Auto Parts, Inc.*, 128 F.3d 103, 107 (2d Cir. 1997); *Carcich v. Rederi A/B Nordie*, 389 F.2d 692, 696 (2d Cir. 1968). Given this strong policy favoring arbitration, waivers of arbitration are not lightly inferred and "any doubts concerning whether there has been a waiver are to be resolved in favor of arbitration." *Leadertex v. Morganton Dyeing & Finishing Corp.*, 67 F.3d 20, 25 (2d Cir. 1995). Three factors are significant in determining waiver: (1) the time elapsed from the commencement of litigation to the request for arbitration; (2) the amount of litigation (including any substantive motions and discovery); and (3) proof of prejudice. *PPG Indus. v. Webster Auto Parts*, 128 F.3d at 108. After review of all factors the District Court concluded that Petitioner's claim of waiver was unfounded, and the Court of Appeals affirmed. Among other reasons, the lower courts concluded that Petitioner could not have been prejudiced by Respondent's delay in raising the arbitration defense because the one year time limitation under COGSA § 1303(6) had already expired before Respondent answered.[6] The same allegations that Petitioner advances here of unfairness and surprise were fully heard and rejected by the District Court, the English court, and the Court of Appeals for the Second Circuit, all of which concluded that Petitioner alone was responsible for the running of the time bar. Petitioner has presented no reason to disturb those decisions.

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6. The COGSA time bar under United States law and the time bar under English law are both one year from the date of discharge of the cargo and would have run on Petitioner's claim on February 25, 1998. Respondent filed its answer on March 11, 1998.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari in this matter be denied.

Respectfully submitted,

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